

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

Anthony Posey,

Plaintiff,

v.

Officer C. Perez, et al.,

Defendants.

Case No. 2:24-cv-01675-CDS-DJA

Report and Recommendation

Southern Desert Correctional Center inmate, Plaintiff Anthony Posey, submitted an application to proceed *in forma pauperis* and a complaint. (ECF Nos. 4, 5). The Court screens Plaintiff's complaint and recommends dismissing it without leave to amend because Plaintiff's claims are better brought through a habeas corpus, and not a civil rights, action. Because the Court recommends dismissing Plaintiff's complaint without leave to amend, it also recommends denying Plaintiff's application to proceed *in forma pauperis* (ECF No. 4) as moot.

I. *In forma pauperis* application.

Plaintiff has filed the forms required to proceed *in forma pauperis*. (ECF No. 4). Plaintiff's forms are complete and Plaintiff has shown an inability to prepay fees and costs or give security for them. However, as outlined more fully below, upon screening Plaintiff's complaint, the Court finds that dismissal without leave to amend is appropriate. So, the Court will recommend denying Plaintiff's application to proceed *in forma pauperis* (ECF No. 4) as moot.

II. Legal standard for screening.

Upon granting an application to proceed *in forma pauperis*, courts additionally screen the complaint under § 1915(e). Federal courts are given the authority to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

1 When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend
2 the complaint with directions as to curing its deficiencies, unless it is clear from the face of the
3 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70
4 F.3d 1103, 1106 (9th Cir. 1995).

5 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a
6 complaint for failure to state a claim upon which relief can be granted. Review under Rule
7 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d
8 719, 723 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of
9 the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp.*
10 *v. Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual
11 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
12 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Papasan v.*
13 *Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled factual allegations
14 contained in the complaint, but the same requirement does not apply to legal conclusions. *Iqbal*,
15 556 U.S. at 679. Mere recitals of the elements of a cause of action, supported only by conclusory
16 allegations, do not suffice. *Id.* at 678. Where the claims in the complaint have not crossed the
17 line from conceivable to plausible, the complaint should be dismissed. *Twombly*, 550 U.S. at 570.
18 Allegations of a *pro se* complaint are held to less stringent standards than formal pleadings
19 drafted by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding that liberal
20 construction of *pro se* pleadings is required after *Twombly* and *Iqbal*).

21 Federal courts are courts of limited jurisdiction and possess only that power authorized by
22 the Constitution and statute. *See Rasul v. Bush*, 542 U.S. 466, 489 (2004). Under 28 U.S.C.
23 § 1331, federal courts have original jurisdiction over “all civil actions arising under the
24 Constitution, laws, or treaties of the United States.” Cases “arise under” federal law either when
25 federal law creates the cause of action or where the vindication of a right under state law
26 necessarily turns on the construction of federal law. *Republican Party of Guam v. Gutierrez*, 277
27 F.3d 1086, 1088-89 (9th Cir. 2002). Whether federal-question jurisdiction exists is based on the
28 “well-pleaded complaint rule,” which provides that “federal jurisdiction exists only when a

1 federal question is presented on the face of the plaintiff's properly pleaded complaint."

2 *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). Under 28 U.S.C. § 1332(a), federal
3 district courts have original jurisdiction over civil actions in diversity cases "where the matter in
4 controversy exceeds the sum or value of \$75,000" and where the matter is between "citizens of
5 different states." Generally speaking, diversity jurisdiction exists only where there is "complete
6 diversity" among the parties; each of the plaintiffs must be a citizen of a different state than each
7 of the defendants. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 (1996).

8 **III. Screening Plaintiff's complaint.**

9 Plaintiff sues his attorney in his state-court criminal case, Todd Leventhal; the Las Vegas
10 Metropolitan Police Department ("LVMPD") Chief, John Doe; Instagram.com; the State of
11 Nevada; LVMPD Officer C. Perez; LVMPD Detective C. Savino; LVMPD Detective M. Moore;
12 and LVMPD Detective B. Lablane for damages. Plaintiff brings various claims related to his
13 state-court conviction and the traffic stop, arrest, investigation, and criminal court proceeding
14 leading up to it. However, Plaintiff's claims are better brought through a habeas corpus, and not a
15 civil rights, action, because they challenge Plaintiff's state-court conviction.

16 42 U.S.C. § 1983—the civil rights statute under which Plaintiff has brought his claims—
17 aims "to deter state actors from using the badge of their authority to deprive individuals of their
18 federally guaranteed rights." *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (quoting
19 *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute "provides a federal cause of
20 action against any person who, acting under color of state law, deprives another of his federal
21 rights[.]" *Conn v. Gabbert*, 526 U.S. 286, 290 (1999), and is "merely . . . the procedural device
22 for enforcing substantive provisions of the Constitution and federal statutes." *Crompton v. Gates*,
23 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under § 1983 require the plaintiff to allege (1) the
24 violation of a federally-protected right by (2) a person or official who acts under the color of state
25 law. *Anderson*, 451 F.3d at 1067.

26 However, § 1983 is not a backdoor through which a federal court may overturn a state
27 court conviction or award relief related to the fact or duration of a sentence. Section 1983 and
28 "the federal habeas corpus statute . . . both provide access to the federal courts 'for claims of

1 unconstitutional treatment at the hands of state officials, . . . [but] they differ in their scope and
2 operation.” *Ramirez v. Galaza*, 334 F.3d 850, 854 (9th Cir. 2003) (quoting *Heck v. Humphrey*,
3 512 U.S. 477, 48 (1994)). Federal courts must take care to prevent prisoners from relying on
4 § 1983 to subvert the differing procedural requirements of habeas corpus proceedings under 28
5 U.S.C. § 2254. *Heck*, 512 U.S. at 486-87; *Simpson v. Thomas*, 528 F.3d 685, 695 (9th Cir. 2008).

6 When a prisoner challenges the legality or duration of his custody, raises a constitutional
7 challenge which could entitle him to an earlier release, or seeks damages for purported
8 deficiencies in his state court criminal case, which effected a conviction or lengthier sentence, his
9 sole federal remedy is a writ of habeas corpus. *Edwards v. Balisok*, 520 U.S. 641, 648 (1997);
10 *Heck*, 512 U.S. at 481; *Wolf v. McDonnell*, 418 U.S. 539, 554 (1974); *Preiser v. Rodriguez*, 411
11 U.S. 475 (1973); *Simpson*, 528 F.3d at 692-93. Stated differently, where “a judgment in favor of
12 the plaintiff would necessarily imply the invalidity of his conviction or sentence,” then “the
13 complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence
14 has already been invalidated.” *Heck*, 512 U.S. at 487.

15 It appears that Plaintiff is challenging the constitutionality of his state court criminal
16 conviction. Plaintiff claims that LVMPD Officers and Detectives violated his rights in
17 conducting the traffic stop, arrest, and investigation that ultimately resulted in Plaintiff’s
18 conviction. Plaintiff alleges that Instagram.com improperly turned Plaintiff’s information over to
19 law enforcement during that investigation. And Plaintiff alleges that his defense attorney failed to
20 raise certain defenses and obtain certain evidence that would have exculpated Plaintiff.

21 However, a finding that LVMPD Officers and Detectives improperly obtained evidence
22 from Instagram and other sources to support Plaintiff’s conviction following an illegal stop, an
23 illegal search or seizure, and an unreasonable arrest would necessarily imply that Plaintiff’s
24 conviction was invalid. *Herring v. United States*, 555 U.S. 135, 139 (2009) (explaining the
25 “exclusionary rule,” which, when applicable, “forbids the use of improperly obtained evidence at
26 trial.”). Similarly, a finding that Leventhal rendered ineffective assistance of counsel would
27 necessarily imply the invalidity of Plaintiff’s conviction. *See Strickland v. Washington*, 466 U.S.
28 668, 694 (1984) (explaining that, for a criminal defendant to show ineffective assistance of

1 counsel, they must “show that there is a reasonable probability that, but for counsel’s
2 unprofessional errors, the result of the proceeding would have been different.”). Consequently,
3 Plaintiff must demonstrate that his conviction has been overturned to proceed in an action under
4 § 1983. As he has not done so, his sole relief for his claims is a habeas corpus action. The Court
5 thus recommends dismissing Plaintiff’s complaint without leave to amend.

6 **IT IS THEREFORE RECOMMENDED** that Plaintiff’s application to proceed *in forma*
7 *pauperis* (ECF No. 4) be **denied as moot**. The Clerk of Court is kindly directed to send Plaintiff
8 a copy of this report and recommendation.

9 **IT IS FURTHER RECOMMENDED** that Plaintiff’s complaint (ECF No. 5) be
10 **dismissed without leave to amend**.

11
12 **NOTICE**

13 Pursuant to Local Rule IB 3-2 any objection to this Report and Recommendation must be
14 in writing and filed with the Clerk of the Court within fourteen (14) days after service of this
15 Notice. The Supreme Court has held that the courts of appeal may determine that an appeal has
16 been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474
17 U.S. 140, 142 (1985) *reh’g denied*, 474 U.S. 1111 (1986). The Ninth Circuit has also held that
18 (1) failure to file objections within the specified time and (2) failure to properly address and brief
19 the objectionable issues waives the right to appeal the District Court’s order and/or appeal factual
20 issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991);
21 *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

22
23 DATED: September 30, 2024

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25 DANIEL J. ALBREGTS
26 UNITED STATES MAGISTRATE JUDGE
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